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Korean Air Lines: The Future Interpretation of "Executive" and "Engage" in Friendship, Commerce and Navigation Treaties

By LAIROLD M. STREET, ESQ.*

INTRODUCTION

Foreign-owned corporations are moving into large metropolitan communities around the United States.¹ For example, in recent years approximately 130 foreign-owned companies chose the greater Washington, D.C. community as headquarters for their American operations, up five-fold from the number based in the nation's capital area a decade ago.² Many of these firms come from countries having treaties similar to the bilateral Friendship, Commerce and Navigation (FCN) treaty be-

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1. A foreign-owned corporation operating in the United States by and large requires American labor to run its local operation, to supervise production, and to oversee its investments here. Local labor provides a "service" in the economic equation of "goods and services" in international business. Cf. Feketekuty, *Trade in Professional Services: An Overview*, 1986 U. CHI. LEGAL F. 1.

2. These firms employ about 16,000 people in the greater Washington, D.C. area. KPMG PEAT MARWICK, THE 1989 SURVEY OF FOREIGN-OWNED COMPANIES WITH U.S. HEADQUARTERS IN GREATER WASHINGTON, D.C. 13 (1990) [hereinafter 1989 SURVEY OF FOREIGN-OWNED COMPANIES]. Americans in the greater Washington, D.C. area are employed in many types of executive and support staff positions. For instance, in the executive category, some hold positions as presidents or general managers, while others serve in professional and nonprofessional capacities as supervisors, clerks, or typists. *Id.* at 12. These Americans work for foreign-owned firms from at least fifteen Asian and European countries. *Id.* at 5, 12. The top foreign-owned employers in the Washington, D.C. area come from the United Kingdom, France, the Federal Republic of Germany, the Netherlands, Italy, Sweden, Canada, and Japan; other firms represented in the area have their corporate homes in Israel, Norway, Finland, Switzerland, Denmark, Belgium, and Spain. *Id.* at 12. The United States has bilateral FCN treaties with nearly all of these countries.

tween the United States and Korea.³ The growing number of foreign-owned firms operating in the United States under FCN treaties presents a significant trend that exposes many Americans to potentially conflicting employment practices.⁴

This modern day phenomenon of a rapidly developing influx of foreign industry and capital may leave some Americans unprotected by U.S. fair employment laws. Americans working in the United States for American firms have Title VII⁵ and other fair employment protections,⁶ as do Americans employed by foreign companies from nations which are *not* FCN treaty partners with the United States.⁷ The Americans at risk are individuals employed by corporations governed by FCN treaty provisions concerning the choice of personnel.

The United States is a party to more than 130 FCN treaties,⁸ many of them bilateral.⁹ Of the bilateral treaties, nearly two dozen are similar to the treaties under scrutiny¹⁰ in *Sumitomo Shoji America, Inc. v. Avagliano*¹¹ and *MacNamara v. Korean Air Lines*.¹² Those cases examined the right of a foreign-owned company to engage executive personnel "of

3. Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, United States-Korea, 8 U.S.T. 2217, T.I.A.S. No. 3947 [hereinafter FCN Treaty].

4. Walker, *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373 (1956); Street, *Application of U.S. Fair Employment Laws to Transnational Employers in the United States and Abroad*, 19 N.Y.U. J. INT'L L. & POL. 357 (1987) [hereinafter Street, *Application of U.S. Fair Employment Laws*]; Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 STAN. L. REV. 947, 952-53 (1979) [hereinafter Note, *Commercial Treaties*].

5. Title VII of the Civil Rights Act of 1964 (Title VII) protects individuals from employment discrimination on the basis of race, color, religion, sex, and national origin. Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, §§ 701-716, 78 Stat. 241, 253-57 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982)).

6. The Age Discrimination in Employment Act (ADEA), Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1982 & Supp. III 1985)) (forbidding employers from discrimination against employees based on their age); The Equal Pay Act (EPA), Pub. L. No. 88-38, § 3, 77 Stat. 56, 56-57 (1963) (codified at 29 U.S.C. § 206(d) (1982)) (prohibiting sex-based discrimination in the payment of wages).

7. Lewis & Ottley, *Title VII and Friendship, Commerce, and Navigation Treaties: Prognostications Based Upon Sumitomo Shoji*, 44 OHIO ST. L.J. (1983). See also *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982); *Wickes v. Olympic Airlines*, 745 F.2d 363 (6th Cir. 1984).

8. Walker, *supra* note 4, at 374. See also Lewis & Ottley, *supra* note 7, at 45-46.

9. See Lewis & Ottley, *supra* note 7, at 45-48; see also Note, *Discriminatory Hiring Practices by Foreign Corporations in the United States—A Limited Right*, 5 FORDHAM INT'L L.J. 509, 513-516 (1982) [hereinafter Note, *Discriminatory Hiring Practices*].

10. Note, *Discriminatory Hiring Practices*, *supra* note 9, at 513-16; see also Ritomsky & Jarvis, *Doing Business in America: The Unfinished Work of Sumitomo Shoji America, Inc. v. Avagliano*, 27 HARV. INT'L L.J. 193, 215-19 (1986).

11. 457 U.S. 176 (1982).

12. 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 349 (1989).

their choice" for certain key positions in the company.¹³ This pursuit is complicated by the lack of a uniform definition of the terms "executive" and "engage" for the purposes of FCN treaties. Article VIII(1) of the FCN treaty between Korea and the United States provides that:

Nationals and companies of either Party shall be permitted to *engage*, within the territories of the other Party, accountants and other technical experts, *executive* personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits, and technical investigations for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.¹⁴

The economic and legal ramifications of having more foreign-owned businesses operating in the United States will become widespread as more Americans work for such companies, especially as they become more aware of the implications on U.S. trade policy and the importance of international trade in services.¹⁵ For example, data on foreign direct investment in this country show a continuing rapid upward turn in investment beginning in the 1980s with no indication of leveling off.¹⁶ In fact, figures indicate that foreign investment transactions have grown dramatically over the past ten years.¹⁷ Further, during the mid-1980s, "over 1,700 foreign-owned firms employ[ed] more than 2.5 million Americans in the United States,"¹⁸ and continued foreign investment presumably will further increase the number of Americans working for foreign corporations in the United States.¹⁹

13. For a discussion of the term "of their choice" in Article VIII(1) provisions in FCN treaties, see generally Walker, *supra* note 4, at 387.

14. FCN Treaty, art. VIII, para. 1, 8 U.S.T. at 2223 (emphasis added).

15. Feketekuty, *supra* note 1, at 16-19.

16. WORLD TRADE ACADEMY PRESS, DIRECTORY OF FOREIGN FIRMS IN THE UNITED STATES v (6th ed. 1989).

17. *Id.*; see also INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: 1987 TRANSACTIONS 3 (1988).

18. Street, *Application of U.S. Fair Employment Laws*, *supra* note 4, at 358 fn. 7 (quoting BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES FOF, No. 6, SELECTED CHARACTERISTICS OF FOREIGN-OWNED U.S. FIRMS: 1982 1-2 (1984)).

19. See *Working for Japan, Inc.*, NEWSWEEK, Feb. 2, 1987, at 42; Anderson, *Is America for Sale?*, PARADE MAG., Apr. 16, 1989, at 6, col. 1; Hicks, *The Takeover of American Industry*, N.Y. Times, May 28, 1989, § 3 (Business), at 1, col. 2. See also Hernessey, *Restructuring Capitalism: The World Catches Takeover Fever*, N.Y. Times, May 21, 1989, § 3 (Business), at 3, col. 1.

As more Americans work for foreign transnational companies, U.S. courts and foreign policymakers will be called upon to sort out the legal rights of the treaty partners, companies, and workers. The central concern will focus on the relationship of U.S. employment laws to FCN treaties. As more foreign-owned firms relocate from nations with which the United States has entered into FCN treaties, and these companies assert their article VIII(1) privileges, there may be a reduction in "the access to executive positions for American applicants in view of the considerable growth of foreign investment in the United States."²⁰ However, the impact of article VIII(1) type provisions of FCN treaties on the employment of Americans for certain jobs is not yet apparent.²¹

This Article uses the *Korean Air Lines* case to examine the meaning of the terms "engage" and "executive," a problem raised by a growing number of cases involving FCN treaties in employment litigation. The Article is divided into five parts. Part I reviews the purpose and legal status of FCN treaties in light of *Sumitomo* and *Korean Air Lines*. Part II considers the interpretations of engage and executive taken from U.S. statutes and from international standards, both of which represent a principal contribution to the understanding of the meaning of these terms. Parts III and IV are devoted to the application and detailed critique of the terms as defined by these statutes and standards. Part V summarizes the Article's findings.

I. COMPANIES OPERATING UNDER FRIENDSHIP, COMMERCE AND NAVIGATION TREATIES

A. Purpose and Legal Status of Friendship, Commerce and Navigation Treaties

Friendship, Commerce and Navigation treaties are bilateral commercial agreements that give legal status to companies of the signatory countries, allowing them to conduct business in the host country on es-

20. Note, *Judicial Decisions*, 75 AM. J. INT'L L. 664, 673 (1981).

21. 1989 SURVEY OF FOREIGN-OWNED COMPANIES, *supra* note 2, at 13. Of the largest foreign-owned firms in the Washington, D.C. metropolitan area, the Canadians are the largest employers of Americans with 7,745 employees. *Id.* The study on employment of foreign-owned companies also notes that:

An examination of foreign national employment in greater-Washington shows that headquarters from some nations rely on U.S. citizens to a greater degree than do others. For example, of the 1,099 positions created by the French headquarters, 169 (15 percent) are filled by French citizens. By contrast, of 4,816 positions created by UK headquarters, 273 (6 percent) are filled by UK citizens.

Id. That report also indicates that in many cases American citizens act as "president, chief financial officer, or general manager" for foreign firms operating in the area. *Id.*

sentially the same footing as domestic companies.²² The United States entered into its first commercial treaty in 1778.²³ The early commercial treaties were primarily concerned with the trade and shipping rights of individuals.²⁴ As business concerns in the twentieth century turned toward corporate involvement in international trade, the United States began to enter into treaties that granted companies the right to function abroad.²⁵ However, these treaties granted only legal status and access to foreign courts, and it was not until after World War II that the United States began to negotiate FCN treaties which allowed the parties to conduct business in the other signatory country on a comparable basis with domestic firms.²⁶ Specifically, FCN treaties allow companies in the signatory countries to establish joint and reciprocal trading principles, and provide for each nation's citizens' property rights and other interests within the territory of the host nation.²⁷ These include the right to engage in business,²⁸ the right to purchase and hold property,²⁹ free access to the courts,³⁰ and judicial recognition of persons and companies by the laws of the host territory.³¹

A signatory to a FCN treaty may be accorded three possible standards of treatment: national treatment, most-favored-nation treatment,

22. Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 806 (1958) [hereinafter Walker, *Modern Treaties*]. The author, Herman Walker, was a chief negotiator of the FCN treaties. See also *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 181 n.6 (1982). Walker has stated:

[The treaties] are above-all . . . concerned with the protection of persons, natural and judicial, and of the property and interests of other persons. They define the treatment each country owes the nationals of the other; their rights to engage in business and other activities within the boundaries of the former; and the respect due them, their property and their enterprises.

Walker, *Modern Treaties*, *supra*, at 806.

The United States is currently a party to 40 such treaties, all enacted after World War II and all having the same or similar language. For a list of the countries with which the United States is a party to an FCN treaty, see 8 U.S.C.A. § 1101 (1988).

23. Walker, *Modern Treaties*, *supra* note 22, at 805.

24. *Sumitomo*, 457 U.S. at 186.

25. *Id.*

26. *Id.* at 186-87. Herman Walker notes that an impetus for foreign companies to seek more rights in the United States than they had previously enjoyed was this country's emergence after World War II as "a principal reservoir of investment capital in a world which ha[d] become acutely 'economic development' conscious." Walker, *The Post-War Commercial Treaty Program of the United States*, 73 POL. SCI. Q. 57, 59 (1957).

27. Walker, *Modern Treaties*, *supra* note 22, at 805-06.

28. See, e.g., Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. VIII, para. 1, 4 U.S.T. 2063, 2070, T.I.A.S. No. 2863.

29. See, e.g., *id.* art. VI, 4 U.S.T. at 2068.

30. See, e.g., *id.* art. IV, 4 U.S.T. at 2067.

31. See, e.g., *id.* art. XXII, para. 3, 4 U.S.T. at 2079.

and absolute treatment. National treatment allows foreign corporations to have the same rights and subjects them to the same responsibilities as domestic companies.³² Most-favored-nation treatment is merely the same treatment accorded to the company of any third country.³³ Absolute treatment allows foreign corporations certain rights irrespective of whether the host country's national corporations receive them.³⁴

B. National Treatment and the Scope of Article VIII(1)

The U.S. Supreme Court's first significant scrutiny of FCN treaty standards of national treatment was in *Sumitomo Shoji America, Inc. v. Avagliano*.³⁵ In that case, the Court concluded that a foreign-owned firm incorporated in New York was entitled to national treatment while operating in the United States.³⁶ The Court considered whether the provisions of the Japan-U.S. FCN treaty excused a subsidiary of a Japanese company incorporated in the United States from the provisions of Title VII of the Civil Rights Act of 1964.³⁷ The Court held that the American incorporated subsidiary was a U.S. company and not Japanese, and thus article VIII(1), which gives a Japanese company the right to select a Japanese citizen or a person "of their choice" for an executive position, was inapplicable.³⁸

The *Sumitomo* decision raised important questions concerning the treatment of FCN treaties in American courts, but did not address several key issues concerning the relationship between FCN's and U.S. fair employment laws.³⁹ The Supreme Court decision left open and un-

32. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 188 n.18 (1982).

33. *Id.*

34. Walker, *Modern Treaties*, *supra* note 22, at 811-12. Absolute treatment is also referred to as noncontingent treatment since, under this standard, rights accorded the foreign corporation are not contingent on the treatment accorded to corporations of other countries. *Id.* There is disagreement over whether FCN treaties provide for national or absolute treatment. However, this dispute goes more toward the question of whether FCN treaties prevail over United States discrimination laws, *i.e.*, whether foreign companies have more privileges than American companies. Since this issue is not the focus of this article, there will be no discussion regarding which standard of treatment applies to signatories of FCN treaties.

35. 457 U.S. 176 (1982).

36. *Id.* at 457-58.

37. *Id.*

38. *Id.*

39. Street, *Application of U.S. Fair Employment Laws*, *supra* note 4, at 375-78; Ritomsky & Jarvis, *supra* note 10, at 215-19. For a discussion of the consent decree in the aftermath of *Sumitomo* and issues it raises concerning the need for better job analysis of the skills actually required for certain jobs, see Reich, *After Avagliano v. Sumitomo Shoji America, Inc.: What Standard of Title VII Will Apply to Foreign-Owned U.S. Subsidiaries and Branches?*, 10 B.C. THIRD WORLD L.J. 259, 281-88 (1990).

resolved questions concerning how U.S. courts should interpret a foreign company or branch office's article VIII(1) right to engage executives of their choice while operating in the United States.⁴⁰ In contrast to the *Sumitomo* decision, *Korean Air Lines*⁴¹ provides an opportunity for insights into how courts might interpret these particular provisions of FCN treaties. The treaty at issue in *Korean Air Lines* contains an employment privilege similar to the article VIII(1) provision of the treaty at issue in *Sumitomo*.⁴²

In *Korean Air Lines*, it was undisputed that the foreign-owned firm was entitled to invoke article VIII(1) of the U.S.-Korea FCN treaty.⁴³ Because Korean Air Lines (KAL) operates in the United States as an American branch of a foreign corporation rather than as a domestically incorporated subsidiary of a foreign corporation, the *Korean Air Lines* decision takes on additional significance for courts wrestling with the interaction between the language of article VIII(1) type provisions and U.S. antidiscrimination laws.⁴⁴

At the heart of the interaction between FCN treaties and U.S. fair employment laws lies the quandry whether either party to a treaty can hire whomever it wishes to manage and operate the corporation. It is crucial that U.S. courts craft a clear road map for other courts to follow, and pave the way to an appropriate standard for interpreting the meaning of a treaty involved in litigation. Otherwise, enforcement of these treaties will result in many corporations hiring their citizens to the exclusion of nationals of the host country. This is because:

A FCN treaty permits a foreign company to fill all of its top management positions or any one management level with "treaty-trader" supervisors, executives, and other specialists. Unfettered use of treaty traders may result in discrimination against Americans on the basis of

40. Street, *Application of U.S. Fair Employment Laws*, *supra* note 4, at 387-88.

41. *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 349 (1989). For a brief discussion of some of the issues in the *MacNamara* case, see generally Street, *International Commercial and Labor Migration Requirements as a Bar to Discriminatory Employment Practices*, 31 *How. L.J.* 497, 504-05 (1988); Note, *Treaties of friendship, commerce and navigation—subsequently enacted legislation—Civil Rights Act of 1964—Age Discrimination in Employment Act of 1967*, 84 *AM. J. INT'L LAW* 565 (1990).

42. *Korean Air Lines*, 863 F.2d at 1139.

43. Brief for the United States as Amicus Curiae at 1, *Korean Air Lines* (Nos. 88-1449 & 88-1551) [hereinafter Brief for the U.S.]; see also Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 5, *Korean Air Lines* (No. 88-1449) [hereinafter KAL's Petition]; Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 1, 6, *Korean Air Lines* (No. 88-1551) [hereinafter *MacNamara's Cross-Petition*].

44. The U.S. Supreme Court denied the petitioners a writ of certiorari to the U.S. Court of Appeals for the Third Circuit. *Korean Air Lines*, 110 S. Ct. at 349.

national origin by substantially reducing the number of jobs with foreign companies available to U.S. citizens. Determining who shall qualify for a treaty-trader visa may effectively determine the extent to which foreign companies are allowed to fill management and specialist positions with their own nationals.⁴⁵

Article VIII(1) has come back to haunt the United States, which in the past pushed through treaties with a number of nations that often resisted U.S. initiatives to obtain national treatment for U.S. business abroad.⁴⁶ The United States originally ruled the roost in foreign trade; later, other nations became formidable trade competitors. These nations now invoke FCN treaties to employ their own citizens in running their corporations operating in the United States. Ultimately, this foments hard feelings as otherwise qualified American workers of these foreign-owned corporations find themselves excluded or eliminated from high level jobs solely because they are American.⁴⁷ The U.S. Government can do more to clarify the meaning of FCN treaties, thereby reducing any potentially negative impact on American executive personnel. For instance, the State Department, which conducts U.S. foreign policy and relations, should be more assertive and less evasive when asked for guidance on whether a particular treaty permits a foreign subsidiary to fill executive personnel positions. Rather, it has merely stated that "[w]e express no opinion on what position would, in a particular case, qualify as executive personnel."⁴⁸

C. Article VIII(1) Issues Raised by the *Korean Air Lines* Case

The FCN treaty between the United States and Korea was involved in *Korean Air Lines*.⁴⁹ Article VIII(1) of the treaty gives the signatories the right to "engage, within the territories of the other Party . . . execu-

45. Street, *Application of U.S. Fair Employment Laws*, *supra* note 4, at 389.

46. Compare Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229 (1956) (favoring such treaties as providing foundation for American investment abroad) with Leigh, *Judicial Decisions — Avigliano v. Sumitomo Shoji American, Inc.*, 75 AM. J. INT'L L. 671 (1981) (supporting interpretation of FCN treaties so as to not give foreign companies special exceptions to avoid American employment laws).

47. See *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982).

48. Letter from the State Department Deputy Legal Advisor, Lee R. Marks, to then General Counsel of the Equal Employment Opportunity Commission, Abner W. Sibal (Oct. 17, 1978), reprinted in part in Nash, *Contemporary Practice of the U.S. Relating to International Law*, 73 AM. J. INT'L L. 282 (1979).

49. *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988), cert. denied, 110 S. Ct. 349 (1989).

five personnel . . . of their choice.”⁵⁰ This provision was included “to prevent the imposition of ultranationalistic policies with respect to essential executive and technical personnel.”⁵¹ The purpose of the treaty, however, is to allow foreign companies to manage and control their investments abroad.⁵²

1. MacNamara's Plight and Korean Air Lines

The plaintiff, MacNamara, a fifty-seven year-old white male, was fired from his job as a district sales manager by defendant, KAL, and replaced by a forty-two year-old Korean male.⁵³ Plaintiff brought suit under both Title VII of the Civil Rights Act of 1964,⁵⁴ alleging discrimination on the basis of national origin,⁵⁵ and under the Age Discrimination in Employment Act (ADEA),⁵⁶ alleging age discrimination.⁵⁷ KAL claimed in defense that article VIII(1) of the U.S.-Korea FCN treaty gave the company the right to terminate executives as it chose without regard to U.S. antidiscrimination law.⁵⁸ Defendant contended that both MacNamara and his replacement were executives within the meaning of the treaty, and that the word “engage,” as used in the treaty, protected

50. FCN Treaty, art. VIII, para. 1, 8 U.S.T. at 2223 (emphasis added). For the full text of article VIII(1), see *supra* text accompanying note 14. All FCN treaties contain this provision or one that is similar.

51. *Sumitomo*, 457 U.S. at 181 n.6 (quoting Walker, *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 386 (1956)). The United States faced various obstacles to conducting business in foreign countries, one of which was foreign laws requiring American companies abroad to hire a certain percentage of their employees from among citizens of the host country. Note, *Commercial Treaties*, *supra* note 4, at 948. These restrictive foreign laws are often referred to as percentile restrictions. This provision, therefore, was included in the FCN treaties on the insistence of the United States. *Sumitomo*, 457 U.S. at 181 n.6.

52. Article VIII(1) allows nationals and companies of either party “to control and manage enterprises which they have established or acquired.” FCN Treaty, art. VIII, para. 1, 8 U.S.T. at 2223.

Both plaintiff and defendant agreed that the proper way to analyze whether an individual is an executive within the meaning of the treaty is to inquire whether he is in a position of management and control of the enterprise. See Appellant's Brief at 35, *Korean Air Lines* (No. 87-1741); Appellee's Brief at 43, *Korean Air Lines* (No. 87-1741).

53. *Korean Air Lines*, 863 F.2d at 1137-38. At the time that KAL discharged MacNamara, it also terminated five of its other American managers, replacing all of them with four Korean managers. *Id.* at 1138.

54. 42 U.S.C. § 2000e (1988).

55. *Korean Air Lines*, 863 F.2d at 1138.

56. 29 U.S.C. §§ 621-634 (1988).

57. *Korean Air Lines*, 863 F.2d at 1138. In addition to alleging discrimination on the basis of race, national origin, and age, plaintiff also claimed that his termination caused a deprivation of benefits due under the company's pension plan in violation of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1988).

58. *Korean Air Lines*, 863 F.2d at 1138.

termination decisions.⁵⁹ MacNamara claimed that he was not an executive within the meaning of article VIII(1) because he lacked the authority and responsibilities vested in such a management position.⁶⁰

The District Court for the Eastern District of Pennsylvania granted a motion for summary judgment in favor of the defendant KAL.⁶¹ The court held that MacNamara was an executive within the meaning of the FCN treaty and, therefore, the defendant's actions were protected by the treaty.⁶² The court found that the treaty's phrase "of their choice" gave Korean companies a right to hire and fire executives as they chose without regard to American discrimination laws, thus affording plaintiff no cause of action for discrimination.⁶³ The district court also construed the

59. *MacNamara v. Korean Air Lines*, No. 87-1741, slip op. at 2 (3d Cir. Nov. 6, 1987).

60. *Korean Air Lines*, 863 F.2d at 1141. KAL claimed that it "is essential [for the Supreme Court] to clarify the rights of investors in both countries to manage and control their overseas branch operations with key executives in whom they have the most confidence." KAL's Petition, *supra* note 43, at 9 (emphasis added). MacNamara claimed that he was an administrator without executive responsibilities because his "duties as District Sales Manager were purely administrative[]" and that he was required to get approval of KAL's offices in New York, Los Angeles, or Seoul, Korea before implementing decisions of his own. MacNamara's Cross-Petition, *supra* note 43, at 12. MacNamara also maintained that the Court of Appeals incorrectly "accepted that this job was entitled status as well as his replacement[']s job]." *Id.* The petitioners concede that the FCN treaty allows for the filing of "key positions abroad" as the treaty parties intended. Brief for the U.S., *supra* note 43, at 6 (emphasis added). "The clear implication is that companies normally must hire only those professionals who *do* have the qualifications required" to perform the job. Brief for the U.S., *supra* note 43, at 8. *See also* KAL's Petition, *supra* note 43, at 9; MacNamara's Cross-Petition, *supra* note 43, at 8.

61. *MacNamara v. Korean Air Lines*, 45 Fair Empl. Prac. Cas. (BNA) 384, 391 (E.D. Pa. 1987). Although defendant brought a motion to dismiss, the district court decided the motion as one for summary judgment since it considered matters outside the pleadings. *MacNamara v. Korean Air Lines*, No. 87-1741, slip op. at 1 n.1 (3d Cir. Nov. 6, 1987).

62. *Korean Air Lines*, 45 Fair Empl. Prac. Cas. (BNA) at 388.

63. *Id.* at 390. This article will not discuss the issue of whether Article VIII(1) of the Korean FCN treaty and similar "of their choice" provisions in other FCN treaties give foreign companies protection from U.S. civil rights laws. For a discussion of this issue, see, e.g., Street, *Application of U.S. Fair Employment Laws*, *supra* note 4 (assessing the impact of the Age Discrimination Act of 1967, the Equal Pay Act of 1963, and Title VII of the Civil Rights Act of 1964 on employer-employee relations of foreign companies); Ritomsky & Jarvis, *supra* note 10, at 195 (arguing "that the drafters of the FCN treaties did not intend to create an exemption from discrimination laws for foreign businesses"); Note, *The Rights of a Foreign Corporation and its Subsidiary Under Title VII of the Civil Rights Act of 1964 and Treaties of Friendship, Commerce and Navigation*, 17 GEO. WASH. J. INT'L L. & ECON. 607 (1983) (arguing that the drafters' intent and the history and purpose of the FCN treaties indicate that they are not to supersede American discrimination laws); Note, *Japanese Employers and Title VII: Sumitomo v. Shoji America, Inc. v. Avagliano*, 15 N.Y.U.J. INT'L L. & POL. 653 (1983) (discussing the *Sumitomo* case and the issue of whether FCN treaties give employers the right to disregard American antidiscrimination laws).

term "engage" to necessarily include the right to terminate.⁶⁴

On appeal, the Third Circuit took a different approach to defining engage and executive. Its inquiry was whether the right to engage included the right to *replace* an employee, as MacNamara had been, with a Korean national.⁶⁵ It answered that question in the affirmative.⁶⁶ Also, reasoning that the question of whether MacNamara's position was executive was irrelevant, thus leaving the district court's finding of executive status untested, the court found that the proper inquiry was whether MacNamara's replacement, Mr. Chung, was an executive.⁶⁷ The court held that Chung was an executive within the meaning of the treaty since he entered the United States pursuant to an E-1 treaty trader visa⁶⁸ and since, as a result of the company's reorganization, Mr. Chung's sales territory was larger than MacNamara's had been.⁶⁹

2. The United States Supreme Court Denies Certiorari Review

The U.S. Supreme Court refused to hear KAL's petition for certiorari to clarify MacNamara's executive status under article VIII(1).⁷⁰ On writ of certiorari, KAL again asserted that article VIII(1) gives the Korean U.S. branch office operating here an absolute right to engage Korean executives of their choice;⁷¹ that a conflict between the circuits

64. *Korean Air Lines*, 45 Fair Empl. Prac. Cas. (BNA) at 384-85.

65. *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1141 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 349 (1989).

66. *Id.* at 1140.

67. *Id.*

68. See 8 U.S.C. § 1101(a)(15)(E) (1988). For a definition of treaty trader status, see *infra* notes 97-114 and accompanying text.

69. *MacNamara v. Korean Air Lines*, No. 87-1741, slip op. at 10-11 (3d Cir. Nov. 6, 1987). Even though the court of appeals did not think it necessary to define the terms "executive" and "engage", this article will explore their definitions for two reasons. First, it is only because MacNamara happened to be replaced by a Korean national with treaty trader status that the court of appeals changed its inquiry. Had these circumstances not been present in the case, the court would have had to define these terms. This article, therefore, may be helpful in defining these terms for future cases. Second, the focus of this case is on whether MacNamara was improperly discharged in violation of American discrimination laws, and whether KAL properly carried out this discharge in light of the treaty. Thus, the proper inquiry is whether MacNamara was an executive. KAL argued in its brief for certiorari that the Third Circuit correctly defined the terms "executive" and "engage." KAL's Petition, *supra* note 43, at 8.

70. *MacNamara v. Korean Air Lines*, 110 S. Ct. 349 (1989).

71. KAL argued in its petition for certiorari that the Third Circuit correctly held that the meaning of the term "engage" for "foreign nationals necessarily includes the right to replace people in MacNamara's position with a foreign national." KAL's Petition, *supra* note 43, at 8. MacNamara, on the other hand, reasserted that the dictionary definition of engage did not give KAL "the right to fire [MacNamara] with impunity once it had made such a selection." MacNamara's Cross-Petition, *supra* note 43, at 11. The U.S. Government adopted the view that the right to engage executives "of their choice" encompasses the right to discharge them

exists on this point; and that it is unclear how this provision of the FCN treaty should be applied.⁷² KAL also reasserted its claim that it and other foreign companies would suffer an unnecessary economic burden if required to defend such personnel actions in U.S. courts.⁷³

MacNamara cross-petitioned for certiorari contending that the court of appeals incorrectly rejected some of his claims and imposed unnecessary restrictions on the nature and scope of these claims.⁷⁴ He further contended that the court failed to allow him a right of full discovery at the trial level.⁷⁵ The Third Circuit had permitted MacNamara's disparate treatment claim to proceed,⁷⁶ but dismissed the disparate impact portion of his complaint.⁷⁷

too. Brief for the U.S., *supra* note 43, at 19. A contrary meaning of the term "engage" would "freeze a foreign business' initial management structure and discourage any experimentation with host country executive personnel." *Id.* at 20 (quoting *Korean Air Lines*, 863 F.2d 1135 at 1141). The United States concluded that "the power of removal from office is incident to the power of appointment." *Id.* at 19 (citing *Carlucci v. Doe*, 485 U.S. 904 (1988)); *see also* *Keim v. United States*, 177 U.S. 290, 293 (1900). If a foreign company's right to engage executives "of its choice" encompasses the right to not only hire but discharge executives, then article VIII(1) should not be selectively applied to the employment of executives by foreign companies. If left unchecked, a company in KAL's position could replace a lower level non-executive status employee with a foreign national employee as a pretext for discrimination. *See* *Wards Cove Packing Co., Inc. v. Antonio*, 109 S. Ct. 2115 (1989). For this reason, a court should independently examine a foreign employer's explanation or justification of executive status for a particular employee or replacement to determine whether the job classification of "executive personnel" is a pretext for discrimination.

72. *See* KAL's Petition, *supra* note 43, at 7-9.

73. *Id.* at 8-9.

74. *See* MacNamara's Cross-Petition, *supra* note 43, at 4.

75. *Id.* at 11-12.

76. In disparate treatment cases to determine whether there has, in fact, been discrimination, U.S. courts have developed a three-step order and allocation of proof. First, a plaintiff has the initial burden of proving a *prima facie* case of discrimination. Once a *prima facie* case has been established, the burden shifts to the defendant to articulate some legitimate nondiscriminatory reason for its challenged action. Finally, if the employer articulates a legitimate reason, the burden shifts back to the plaintiff to prove, by a preponderance of the evidence, that the legitimate reason offered was not the true reason, but was rather a pretext for discrimination. *Wards Cove Packing Co., Inc. v. Antonio*, 109 S. Ct. 2115 (1989); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979).

An evaluation of an individual disparate treatment claim allows a person like MacNamara a chance to offer evidence which contradicts the evidence that KAL has submitted to support the company's assertion that he and his replacement are executives. The right to engage executives "of their choice" encompasses the right to discharge an American executive in order to replace him with an equally qualified foreign national for the same position.

77. *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1140-41 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 349 (1989). Title VII of the Civil Rights Act of 1964 entitles MacNamara to bring an employment discrimination action based upon the "adverse impact" theory of discrimination. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, (1988); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). Adverse impact or disparate impact results when an employer's neutral employment policy or practice is applied

3. Government Opposes Certiorari

In response to both petitioners, the U.S. Government entered its

evenhandedly to all employees or applicants but has the effect of disproportionately excluding certain protected groups. If the employee can establish that the company's procedures have a disparate impact, then the company must justify the use of the policy or practice causing the adverse impact as a business necessity. *Watson*, 487 U.S. at 977; *Dothard*, 433 U.S. at 321; *Griggs*, 401 U.S. at 424. The Third Circuit's opinion precludes use of the disparate impact theory. *Korean Air Lines*, 863 F.2d at 1148.

In rejecting MacNamara's disparate impact theory, the court said that he "may not proceed with any claim that KAL violated Title VII by replacing its Caucasian American sales managers with Koreans without regard to its subjective intent." *Id.* The court rejected MacNamara's disparate impact claim because a potential conflict existed regarding the language of the FCN treaty and the extent to which U.S. fair employment laws proscribe personnel decisions based on citizenship solely because of their disparate impact on the basis of age, race, or national origin. *Id.* In so holding, the Court concluded that if disparate impact cases were allowed to proceed, "a foreign business from a country with a homogenous population . . . could be held in violation of Title VII" by merely exercising their article VIII(1) FCN treaty rights. *Id.* The Third Circuit opinion can be understood to mean that any disparate impact theory of liability would have the effect of penalizing a foreign company "from a country with a homogenous population" from exercising its treaty right regardless of the effect on Americans or other individuals working for the foreign company in the United States. *Id.* According to Webster's dictionary, a nation's population is "homogenous" if it consists of uniform elements, as of people or groups with a similar background. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (4th ed. 1976). Of the approximately two dozen FCN treaties to which the United States is a party, virtually all of the countries fall within Webster's definition of a nation having a "homogenous" population (e.g., the Federal Republic of Germany, Belgium, Denmark, Sweden, Norway, Liberia, Ethiopia, or Japan). Each of these countries have "homogenous" populations relative to that of the United States which has sizeable racial, immigrant, national origin, and ethnic groups.

Does the Court's outright rejection of MacNamara's disparate treatment claim preclude a challenge to foreign business citizen preference on the grounds that it has a disparate impact on the basis of national origin when the challenger is an Asian-American or resident alien of Korean descent, and the employer is a Japanese company operating in the United States? For instance, some Koreans living in Japan believe that Japanese companies are reluctant to hire them even when they are either longterm residents or citizens of Japan. See Street, *International Commercial and Labor Migration Requirements as a Bar to Discriminatory Employment Practices*, 31 HOW. L.J. 497, 503 n.14 (1988) (citing N.Y. Times, Sept. 26, 1986, at A13, col. 2). The Korean population is one of the largest of the Asian groups in the United States. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SUPPLEMENTARY REPORT: ASIAN AND PACIFIC ISLANDERS POPULATION BY STATE 1980, at 1-2 (1983).

Will other courts interpret Article VIII(1) of the FCN treaty in conjunction with the Third Circuit's opinion as absolutely barring all disparate impact claims against potentially discriminatory employment practices? After this court decision, can Caucasian-Americans bring a national origin, race, or age discrimination disparate treatment claim against a Swedish or American company? What about an African-American? Is he barred from bringing such an action because he is not white and few blacks live in Sweden? What about a Caucasian or African-American who claims discrimination against an Ethiopian or Liberian firm? Can an American female bring a disparate impact sex claim against any of these firms?

The Third Circuit's decision raises many questions. It appears to question whether the disparate impact analysis is applicable only under certain circumstances. Future courts will need to carefully scrutinize the Third Circuit's opinion that precludes a disparate impact ac-

brief as *amicus curiae* in opposition to the petitions for certiorari.⁷⁸ The Government asserted that the case was not properly before the Court because of its interlocutory posture, as the Third Circuit had remanded the case back to the district court.⁷⁹ The Government also offered its own views on the Third Circuit's decision, claiming that "[t]he decision of the court of appeals is correct"⁸⁰ By denying certiorari in this case, the Supreme Court has chosen to remain silent, for the moment, on the rights of foreign companies operating in the United States to hire and fire only those key professionals who qualify as essential executive personnel.⁸¹

II. ANALYSIS OF THE MEANING OF THE TERMS "EXECUTIVE" AND "ENGAGE"

A. Executive Status Personnel

To assess whether MacNamara was an executive within the meaning of the FCN treaty, it is necessary to describe his job responsibilities. He was a district sales manager, salaried at 23,000 dollars per year.⁸² MacNamara performed a number of specific and general staff duties. His duties included supervising the airline's marketing activity in Pennsylvania, Delaware, and the southern half of New Jersey.⁸³ He also reported monthly on the status of KAL's operations to the Vice President of Marketing for North America in KAL's New York office.⁸⁴ He was responsible for four to six full-time employees.⁸⁵ "He directed the assembly and maintenance of all sales and productivity information."⁸⁶ "He evaluated employee job performance and recommended promotions."⁸⁷

tion by a "Caucasian American sales manager [or other American who is replaced] . . . with Koreans" so as not to limit or restrict the employment rights of Americans or foreign nationals who desire an opportunity to prove their case in court when a reasonable claim exists. *Id.*

78. Brief for the U.S., *supra* note 43, at 5.

79. *Id.*

80. *Id.*

81. *Id.* at 6. See also MacNamara's Cross-Petition, *supra* note 43, at 8; KAL's Petition, *supra* note 43, at 9.

82. MacNamara v. Korean Air Lines, 45 Fair Empl. Prac. Cas. (BNA) 384, 388 (E.D. Pa. 1987).

83. *Id.*

84. *Id.*

85. *Id.* Plaintiff contends that his supervisory duties were minimal since the employees that reported to him were low level staff: a secretary, a ticket agent, and a cargo representative. Appellant's Brief, *supra* note 52, at 37.

86. Korean Air Lines, 45 Fair Empl. Prac. Cas. (BNA) at 388.

87. *Id.* However, MacNamara was not given final authority for hiring and firing decisions. He merely made recommendations to the regional office. Appellee's Brief, *supra* note 43, at 5.

He issued and signed checks for office expenses, was responsible for all cargo and passenger sales within the district, prepared marketing plans and objectives for sales staff, and implemented marketing strategy changes without authorization from headquarters.⁸⁸

B. District Court Definition of Executive Status

The term "executive" is not defined anywhere in the treaty,⁸⁹ nor does any case law define it for treaty purposes. The district court defined executive as "personnel who [are] directly involved in the company's policymaking, directly involved in the administration of that policy, or . . . report the economic or legal status of the enterprise directly to the company's top management,"⁹⁰ and "whose services are essential to the functioning of a business enterprise."⁹¹ The court also required that the responsibilities be "necessary to the efficient conduct of the business and protection of the foreign investment."⁹² It rejected plaintiff's contention that an executive must be an officer or director of a company.⁹³ The court also applied the test from the Fair Labor Standards Act (FLSA) for exempt executive status.⁹⁴ Based on MacNamara's responsibilities, the court held that he was an executive.⁹⁵ The court concluded that since MacNamara's Korean replacement, Mr. Chung, was a treaty trader, and since KAL was consolidating many of its operations to bring them within Mr. Chung's responsibilities, KAL had legitimately exercised its right to manage its investment.⁹⁶

88. *Korean Air Lines*, 45 Fair Empl. Prac. Cas. (BNA) at 388. But see Appellant's Brief, *supra* note 52, at 37 (MacNamara's role as a supervisor is described as "minimal" pertaining only to "low level" employees). See also Appellee's Brief, *supra* note 52, at 5 (MacNamara did not do the hiring himself but rather interviewed applicants and recommended his hiring preferences to the regional office, which were approved in each case).

89. *MacNamara v. Korean Air Lines*, No. 87-1741, slip op. at 9 (3d Cir. Nov. 6, 1987).

90. *Korean Air Lines*, 45 Fair Empl. Prac. Cas. at 387. The court also included personnel "who were engaged to provide an essential technical service" within the protection of the "of their choice" language, but this definition would appear to pertain to technical experts, and not to executives. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* All of these criteria were the district court's own definition; it cited no authority for these definitions.

94. *Id.* at 388. For a discussion of the Fair Labor Standards Act, see *infra* notes 115-132 and accompanying text.

95. *Korean Air Lines*, 45 Fair Empl. Prac. Cas. (BNA) at 388. ("Unquestionably, plaintiff's job responsibilities and duties were executive in nature and essential to the administration of policy of the company.")

96. *Id.*

C. Interpretive Authorities and the Meaning of Executive

1. Definition of Executive Under the Immigration and Naturalization Act (INA)⁹⁷

The INA was enacted to complement FCN treaties.⁹⁸ For this reason, employees who enter the United States pursuant to this statute are known as "treaty traders." The INA, however, offers courts very little by way of a concrete definition of executive and does not enumerate the types of responsibilities that would be considered executive in nature. It merely states that treaty traders must enter the country "solely to carry on substantial trade."⁹⁹

Because the State Department is responsible for implementing the INA's mandate,¹⁰⁰ and its decisions are subject to minimal judicial scrutiny,¹⁰¹ courts give considerable weight to the State Department's definition of a treaty trader in the Code of Federal Regulations (C.F.R.). However, the State Department regulations merely provide that to be eligible for a treaty trader visa, an employee seeking entry must have "duties of an executive or supervisory character," but they do not enumerate these duties.¹⁰²

Moreover, no cases interpret the definition of executive under the INA. The sparse case law pertaining to executive eligibility for treaty trader status, including administrative decisions of the Board of Immi-

97. 8 U.S.C. §§ 1101-1525 (1988). Another visa category that mentions executives is the intra-company transfer category, which applies to individuals who wish to enter the United States temporarily to do work in a managerial or executive capacity for a U.S. office of their company. 8 U.S.C. § 1101(a)(15)(L) (1988); 22 C.F.R. § 41.54 (1990). These regulations contain no further explanation of the term "executive."

98. *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1142 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 349 (1989). *See also* 8 U.S.C.A. § 1101 (West 1970) (listing FCN treaties to which the treaty trader classification pertains).

99. 8 U.S.C. § 1101(a)(15)(E)(i) (1988). The statute provides that a visa may issue to an alien if the purpose of the entry is "solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national." *Id.*

Treaty investors constitute another visa category. They are to be issued visas if the purpose of entry is "solely to develop and direct the operations of an enterprise in which [they have] invested, or of an enterprise of which [they are] actively in the process of investing, a substantial amount of capital." 8 U.S.C. § 1101(a)(15)(E)(ii) (1988).

100. 8 U.S.C. § 1104 (1988).

101. *Kun Young Kim v. Dist. Director of the United States Immigration and Naturalization Service*, 586 F.2d 713, 716 (9th Cir. 1978).

102. 22 C.F.R. § 41.51(c)(1990) states:

An alien employee of a treaty trader may be classified E-1 . . . if the employee is or will be engaged in duties of an executive or supervisory character, or, if employed in a minor capacity, the employee has special qualifications that make the services to be rendered essential to the efficient operation of the enterprise.

gration Appeals, addresses only the other categories of treaty trader, such as technical experts.¹⁰³

Since the INA and its regulations and case law offer little guidance for determining which jobs are executive within the Act, courts may consider turning to internal State Department correspondence or practice.¹⁰⁴ When it issues treaty trader visas, State Department determinations as to which positions are executive within the scope of FCN treaties are highly subjective. In deciding whether to grant treaty trader visas, State Department officials rely on several factors: the statute itself, the regulations and decisions of the Board of Immigration Appeals,¹⁰⁵ and the qualifications of the applicant for the proposed position of employment.¹⁰⁶

The State Department has issued instructions regarding treaty trader visas which set forth more specific criteria.¹⁰⁷ According to these instructions, the pertinent inquiry is whether the executive or supervisory duties are a principal part of the position or merely incidental to it.¹⁰⁸ If the job entails responsibility for a large part of the company's operation

103. See, e.g., *Matter of Re Z— and R—*, 8 I & N Dec. 482 (Assistant Comm'r 1959); *Matter of Konishi*, 11 I & N Dec. 815 (Regional Comm'r 1966) (Executive Assistant was denied treaty trader status because the Board of Immigration Appeals determined that mere job title and language abilities do not constitute the "special qualifications" necessary to her employer's operation as contemplated by the regulations). However, this "special qualifications" test is the C.F.R. standard for treaty traders "employed in a minor capacity" and therefore would not address the standard for executives.

104. See *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.")

105. Letter from Lee Marks to Abner W. Sibal (Oct. 17, 1978), reprinted in Nash, *supra* note 48, at 282-84. This letter describes the criteria used by the State Department to determine which positions are within the scope of the treaty when it issues nonimmigrant visas to treaty traders. The State Department "express[ed] no opinion on what positions would, in a particular case, qualify as executive personnel positions involving foreign nationals admitted to the U.S. as treaty traders. *Id.*, reprinted in Nash, *supra* note 48, at 282.

106. *Id.*, reprinted in Nash, *supra* note 48, at 283.

107. U.S. DEP'T OF STATE, INSTRUCTIONS TO DIPLOMATIC AND CONSULAR POSTS REGARDING TREATY TRADER VISAS, para. 5 (1981). This paragraph states in full:

Once all the necessary facts and evidence are before the consular officer in a specific case, the test to be applied is essentially one of whether the executive/supervisory component of the described position is an "incidental/collateral" function of the job or a "principal/primary" function essentially inherent in the job's very nature. If the position principally requires management skills, or entails supervision over and key responsibility for a large portion of a firm's operation, and only incidentally involves substantive, day-to-day staff work related to the firm's type of business, E-1 would be appropriate in most circumstances. Conversely, if the position chiefly involves routine work that is the subject matter of the business and only secondarily entails supervision of several low-level employees, then the position in all probability could not be termed "executive or supervisory" in character.

108. *Id.*

and principally requires management skills, then it is an executive position, and an E-1 treaty trader visa should be issued.¹⁰⁹ If the position consists mainly of routine work and only incidentally involves supervision of low-level employees, then it is not an executive position.¹¹⁰ Further, the position will only be considered executive if it is a top-level management position.¹¹¹ Some relevant factors in this determination are the degree of ultimate control and responsibility for a company's overall operations inherent in the position, and whether the applicant has had prior executive or supervisory experience.¹¹²

Though the INA was enacted to complement the FCN treaties, there are several reasons to explore other U.S. statutes and international criteria to determine whether these may be more helpful in defining executive. First, while the INA and its regulations and case law shed little light on the definition of executive, other statutory, regulatory, or case law definitions may offer greater specificity. Second, because the decision to issue a treaty trader visa is based in part upon the qualifications of the particular *applicant*,¹¹³ the decision itself may not be determinative of whether the *position* is executive.¹¹⁴ Third, since the district court relied on the definition of executive in another statute, the FLSA, other statutes and international guidelines are presumably valid sources of interpretation.

2. The Fair Labor Standards Act Definition¹¹⁵

The FLSA, enacted in 1938, set minimum wages, maximum working hours, and overtime pay requirements so that employees could enjoy a "minimum standard of living necessary for health, efficiency, and general well-being of workers."¹¹⁶ Certain types of jobs, including executive positions, were deemed exempt from the wage and hour protections of the FLSA, since their salary and working hours did not threaten the minimum standard of living.

The Administrator of the Wage and Hour Division of the Depart-

109. *Id.*

110. *Id.*

111. *Id.* para. 6.

112. *Id.* para. 4.

113. See *supra* note 106 and accompanying text.

114. Thus, a determination that MacNamara's replacement, Mr. Chung, was a treaty trader may not be determinative of whether McNamara was an executive, or whether the position itself was an executive position.

115. Fair Labor Standards Act of 1938, ch. 676, § 2(a), 52 Stat. 1060 (current version at 29 U.S.C. §§ 201-219 (1988)).

116. 29 U.S.C. § 213(a) (1988).

ment of Labor, by regulation, has defined the term "executive."¹¹⁷ These regulations have the force of law if they reasonably construe the language and the clear intention of the FLSA.¹¹⁸ The regulations set forth two tests to determine which positions are executive. First, if the salary is above 250 dollars per week, a two-part test is applied: (1) management of the enterprise must be a primary duty, and (2) the individual must regularly supervise the work of two or more employees.¹¹⁹ If the salary level is between 155 dollars and 250 dollars per week, the above criteria, plus the following, must be met: (1) the individual has the authority to hire and fire, (2) the individual regularly exercises discretion, and (3) if the individual is not in charge of an independent establishment (the "sole charge exception"), he must spend less than twenty percent of his weekly hours performing non-exempt work.¹²⁰ All of these administrative requirements must be met for a job to constitute an executive position.¹²¹ While neither high salary nor title¹²² determines executive status, duties are determinative.¹²³ Applicable sections of the C.F.R. represent the clear intentions of the FLSA.¹²⁴

These criteria are not directly applicable to FCN treaty partners, because the FLSA is a domestic statute designed to focus on local concerns of American companies. Other nations may have different ideas about how their companies should handle minimum standards of pay, primary duties, and supervisory responsibilities.

Most cases which interpret the specific factors in these tests have focused on defining "discretion." The courts have determined that executive exercise of discretion must entail decisions regarding policy, not merely the mechanics of performance.¹²⁵ It involves more than the ordinary discretion which any skilled worker exercises in day-to-day activities.¹²⁶ Further, an individual is deemed to have exercised discretion even if his decisions have been prescribed by prior instruction, such as a policy manual,¹²⁷ or are subject to approval by a higher level of

117. 29 C.F.R. § 541.1 (1989).

118. *Stanger v. Glenn L. Martin Co.*, 56 F. Supp. 163, 165 (D. Md. 1944). *See also Walling v. General Industries Co.*, 330 U.S. 545, 547 (1947).

119. 29 C.F.R. § 541.1 (1988).

120. *Id.*

121. *Rothman v. Publiker Industries, Inc.*, 201 F.2d 618, 619 (3d Cir. 1953).

122. *Stanger*, 56 F. Supp. at 166.

123. *Id.* at 164.

124. 29 C.F.R. § 541.1 (1988).

125. *Rothman*, 201 F.2d at 620.

126. *Schanck v. Lehigh Valley R. Co.*, 52 N.Y.S.2d 491, 492 (City Ct. 1941).

127. *Donovan v. Burger King Corp.*, 672 F.2d 221, 223, 226 (1st Cir. 1982).

management.¹²⁸

Courts have determined that many jobs considered to be rather low-level managerial positions fit within the FLSA definition of executive. For example, Burger King assistant managers who make more than 250 dollars per week,¹²⁹ restaurant managers of a waffle house,¹³⁰ section foremen in mines,¹³¹ and bowling alley managers¹³² have all been found to be executives.

3. Age Discrimination in the Employment Act of 1967 (ADEA) Definition

When Congress amended the Age Discrimination in Employment Act¹³³ (ADEA) to raise the upper age limit for mandatory retirement from sixty-five to seventy, it retained sixty-five as the mandatory retirement age for executives.¹³⁴ Congress carved out this exception to permit employers to replace certain key employees and to keep promotional channels open for younger employees.¹³⁵ The House report made it clear that the intent was to include only "bona fide executives" within this exception.¹³⁶

Because the intent of Congress was to define executive more narrowly in the ADEA than in the FLSA,¹³⁷ it included all of the criteria from the FLSA definition and added examples to illustrate the positions that would qualify as executive under the ADEA.¹³⁸ The FLSA definition and these examples are embodied in the C.F.R.¹³⁹ The examples of a "bona fide executive" include the following: the head of a significant and substantial local or regional operation but not of a minor branch; heads of major corporate divisions or departments, such as finance, marketing, legal, and productline basis; and immediate subordinates of heads

128. *Dymond v. U.S. Postal Service*, 670 F.2d 93, 96 (8th Cir. 1982).

129. *Donovan*, 672 F.2d at 221.

130. *Donovan v. Waffle House*, 99 Lab. Cas. (CCH) ¶ 34,457 (1983).

131. *Guthrie v. Lady Jane Collieries, Inc.*, 99 Lab. Cas. (CCH) ¶ 34,482 (1983), *aff'd*, 722 F.2d 1141 (3d Cir. 1983).

132. *Marshall v. Hendersonville Bowling Center, Inc.*, 91 Lab. Cas. (CCH) ¶ 34,023 (1980).

133. 29 U.S.C. §§ 621-634 (1988).

134. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 12, 92 Stat. 189 (codified at 29 U.S.C. § 631(c) (1988)).

135. S. REP. NO. 493, 95th Cong., 2d Sess. 7, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 504, 510.

136. H.R. REP. NO. 950, 95th Cong., 2d Sess. 9, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 504, 530-31.

137. *Id.*

138. *Id.*

139. 29 C.F.R. § 1625.12(d)(1) (1990).

of these divisions if the organization is large.¹⁴⁰

The courts, in keeping with congressional intent, have interpreted the meaning of executive within the ADEA very narrowly. One court held that a high level of compensation and perquisites were not determinative of executive status; however, they are factors to consider.¹⁴¹ The Second Circuit Court of Appeals gave a particularly narrow meaning to executive in *Whittlesey v. Union Carbide Corp.*¹⁴² The *Whittlesey* court held that the high salaried chief labor counsel of a large corporation was not an executive.¹⁴³ The court found that he had few administrative or executive responsibilities because his primary duty was to perform legal work, that his supervisory duties were minimal, and that he played a minor role in policymaking.¹⁴⁴

"Bona fide executives" within the ADEA definition, therefore, include only a few top-level employees who exercise substantial executive authority over a significant number of employees and a large volume of business. Thus, middle managers are not executives within the meaning of the ADEA.

The Equal Employment Opportunity Commission (EEOC) administers the ADEA. The EEOC's interpretation of the ADEA exemptions is reflected in its interpretive regulations in the C.F.R.¹⁴⁵ These regulations define the term "bona fide executive" and provide guidance on how to determine whether an employee qualifies as such. The EEOC notes that its policy guidelines regarding the meaning of executive should be used in conjunction with the U.S. Department of Labor's interpretive regulations.¹⁴⁶ These regulations define the executive for Labor Department purposes as *not* applying to an employee who "is in sole charge of a physically separated branch establishment."¹⁴⁷ The regulation also seeks to define executive on the basis of a position's primary duties, authorities, responsibilities, discretionary powers, and the percentage of work devoted to specific tasks.¹⁴⁸

Applying the Department of Labor's interpretive regulations, in conjunction with those of the EEOC, to the facts of *Korean Air Lines*, MacNamara might not qualify as an executive for at least two reasons.

140. 29 C.F.R. § 1625.12(d)(2).

141. *Colby v. Graniteville Co.*, 635 F. Supp. 381, 385 (S.D.N.Y. 1986).

142. 742 F.2d 724 (2d Cir. 1984).

143. *Id.* at 725.

144. *Id.* at 726-27.

145. 29 C.F.R. §§ 1625.12, 1627.17 (1990).

146. 29 C.F.R. § 541.1(a)-(e) (1989).

147. *See* 29 C.F.R. § 541.1(e) (1989).

148. 29 C.F.R. § 541.1 (1988).

First, as discussed above, the scope of his duties was limited. Second, MacNamara was employed only in a branch office of the KAL establishment in the United States. Both circumstances weigh against MacNamara's position being considered executive under the ADEA guidelines.

4. Bankruptcy Act Definition of Executive

Bankruptcy law¹⁴⁹ limits liability for false financial statements to those who are more likely to be aware of the severe consequences that may follow.¹⁵⁰ The case law on this statutory provision is scarce, but courts have held that a person deemed an executive under the Bankruptcy Act must hold a position with policymaking authority,¹⁵¹ and that the fact that an employee is a corporate officer, director, or stockholder is not determinative.¹⁵²

5. International Labor Organization Definition of Executive

In addition to U.S. domestic authorities, the *Korean Air Lines* courts could have turned to the International Labor Organization (ILO)¹⁵³ for guidance on a suitable definition of executive status personnel. The Geneva-based ILO, the oldest of all the specialized UN agencies,¹⁵⁴ provides wide-ranging assistance to the international community on labor-related matters.¹⁵⁵ The characterization of high-level management positions developed by the ILO could be used to complement U.S. domestic sources in defining executive in a way which comports with the common worldwide understanding of that term.¹⁵⁶

The ILO, in conjunction with many governments and other international organizations,¹⁵⁷ developed the "International Standard Classifica-

149. 11 U.S.C. § 727(a)(4) (1988).

150. S. REP. NO. 1688, 86th Cong., 2d Sess. 2, reprinted in 1960 U.S. CODE CONG. & ADMIN. NEWS 2954, 2955.

151. In Re Dunn, 422 F.2d 501, 503 (2d Cir. 1970).

152. In Re Butler, 425 F.2d 47, 52 (3d Cir. 1970).

153. The International Labor Organization (ILO) was created in 1919 as part of the League of Nations. The international agency offers an international mechanism for improving labor standards and for collecting and disseminating information on labor and industrial relations. The ILO's basic objectives were broadened in 1944 when the ILO adopted the "Declaration of Philadelphia." Soon after this major development, the ILO became a specialized agency of the United Nations. See generally A. ALCOCK, HISTORY OF THE INTERNATIONAL LABOR ORGANIZATION (1971).

154. *Id.*

155. INTERNATIONAL LABOUR OFFICE, INTERNATIONAL STANDARD CLASSIFICATION OF OCCUPATIONS III (1968) [hereinafter ISCO].

156. *Id.*

157. *Id.*

tion of Occupations" (ISCO).¹⁵⁸ The ISCO index compares information relating to the function, duties, and tasks of relevant jobs from countries worldwide into a common classification system.¹⁵⁹

The ISCO offers a useful characterization of executive status personnel. The ISCO is a useful reference "and a basic tool organizing occupational information for international purposes"¹⁶⁰ It systematically evaluates and rates occupations, and in doing so, captures the essence of each job function, giving true meaning to the term "executive": it offers a comparison of jobs and elaborates on the substance of the duties performed by executive status personnel.¹⁶¹

The ISCO's definition for each worker occupation is broken into several minor and major groupings which classify a number of occupations into "professional," "technical," or other categories, and defines the functions, duties, and tasks of such positions.¹⁶²

Managerial personnel are described as people who serve as "directors and managers, [who] plan, organise, co-ordinate and direct the activities of private or public enterprises, or organizations, or one or more of their departments"¹⁶³ The ISCO offers several subcategories under the term "manager."¹⁶⁴ These subgroupings include individuals performing management functions.¹⁶⁵ Some members of these subgroupings may have "special titles, including such terms as 'chief,' 'director' or

158. *Id.* The ISCO was "developed to provide a systematic basis for presentation of occupation data relating to different countries in order to facilitate international comparisons . . . to provide an international standard classification system which countries may use in developing their national occupational classifications . . . with the aim of achieving convertibility to the international system." *Id.* The United States, and at least thirteen countries, submitted comments adopting the "International Conference of Labor Statisticians, which [met] under the auspices of the International Labor Organization in 1954." *Id.* The United States officially participated in and endorsed the ILO classification of the Ninth International Conference on labor statistics. INTERNATIONAL LABOUR OFFICE, GENERAL REPORT ON LABOUR STATISTICS 52 (1957) (report prepared for the Ninth International Conference of Labor Statisticians).

159. ISCO, *supra* note 155, at 2.

160. *Id.* at III.

161. *Id.*

162. *Id.* at 35-93.

163. *Id.* at 93. Both the "manager" and "government executive" perform similar functions, duties, and tasks, and their respective job classifications merit executive status. However, this may not be the case in other instances as not all professional or technical staff positions "coupled with some limited responsibility for supervision" under the title "manager" merit executive status. *Id.* at 11.

Nonetheless, the ISCO classification of the two equivalent titles, manager and government executive, fall within the type of functions, duties, and tasks generally thought of as those performed by an executive.

164. *Id.* at 95-97.

165. *Id.*

'manager,' but . . . do not principally carry out duties within the scope of the functions of management."¹⁶⁶ Such individuals "principally perform professional or technical functions,"¹⁶⁷ but are not considered managers.¹⁶⁸ Presumably, these are not persons who possess executive authority and responsibilities or perform executive-type tasks. Rather, such employees have special titles, but do not hold positions which entitle them (or their replacements) to receive executive status.

The index of occupations can provide both U.S. courts and the U.S. Department of State with a yardstick to measure and evaluate each of the various functions, duties, and tasks of a particular worker.¹⁶⁹ The classification system could be used to substantiate treaty trader status for certain employees who claim executive status. Although the ISCO does not specifically mention FCN treaties or define executive, it does provide a generic definition for the term that might generally be useful in disputes involving FCN treaties.

The ISCO is not definitive of the term "executive" as it is used in the private sector, but it does give a working definition of the term "manager" as a useful reference point, and elaborates on the meaning of executive in the public sector for government personnel.¹⁷⁰ This characterization of government executive personnel is useful to the discussion of executive status personnel in the private sector. For example, under the ISCO, a sales manager¹⁷¹ is an individual who holds a job position which requires him to "plan[], organise[] and control[] sales activities of an industrial undertaking or other organisation." Such a person is classified as managerial personnel,¹⁷² and is presumably an ex-

166. *Id.* at 95.

167. *Id.*

168. *Id.*

169. *Id.* at 2. See also *id.* at 9-12 for a discussion of definitions and titles.

170. See *supra* note 156.

171. ISCO, *supra* note 155, at 96.

172. *Id.* A "general manager" "plan[s], direct[s], control[s] and co-ordinate[s] on proprietor's or on own behalf, the activities of an . . . enterprise . . ." *Id.* at 95. General managers coordinate the work of departmental managers or other immediate subordinates. *Id.* A "government administrator" official appears to perform functions analogous to those of a "general manager" in the private sector, who appears to operate as an executive of a corporation. See *id.* at 94.

A general manager is specifically excluded from the definition of certain types of establishments. *Id.* at 95. This category may be more akin to the "government administrator" who, like the general manager, "plan[s], organise[s] and direct[s] activities of government departments and agencies to implement government policy and laws, rules and regulations" or some other enterprise. *Id.* at 94.

Persons classified as government executives "put into effect government policy decisions and implement laws, rules and regulations under the direction of *government administrators*."

ecutive. Plaintiff MacNamara's job title was district sales manager, but his duties did not include those listed in the ISCO definition. Thus, MacNamara was not managerial personnel under the ISCO.

Much consideration should be given to the ILO's systematic occupational classifications. Application of the ILO's methodical analysis to FCN treaty disputes may reduce potential conflict of jurisdictions or avoid other foreign policy tensions between nations.

D. The Meaning of Engage in the FCN Treaty

In *Korean Air Lines*, MacNamara argued that the use of the term "engage" in the treaty¹⁷³ gives foreign companies only the right to hire executives of their choice, not to fire them. His argument relied on dictionary definitions of engage,¹⁷⁴ and on the fact that there exists no indication that the drafters of the FCN treaty intended the term "engage" to also mean terminate.¹⁷⁵ He also relied on "common sense."¹⁷⁶

KAL took a more policy-oriented approach toward defining engage,¹⁷⁷ reasoning that including the right to terminate in the right to hire made sense for four reasons. First, the interpretation is more in keeping with the treaty's assurance that foreign companies may manage and control their investments.¹⁷⁸ Second, it comports with the Korean government's interpretation.¹⁷⁹ Third, it makes more economic sense to allow companies to reorganize and eliminate positions, which would not be possible if the companies were prohibited from firing the employees holding certain positions.¹⁸⁰ Finally, it coincides with the plain meaning of the term.¹⁸¹

The district court opinion adopted the Korean Ministry of Foreign Affairs's broad interpretation of the "of their choice" language. Under the ministry's broad interpretation, foreign employers are given free dis-

Id. at 100. An executive serving in this capacity may perform executive secretarial duties for departmental heads on behalf of governmental administrators. *Id.* The governmental executive official classification does not encompass "employees whose principle functions are to carry out professional, technical and related duties." *Id.*

173. See *supra* text accompanying note 14 for treaty language.

174. See MacNamara's Cross-Petition, *supra* note 43, at 10-11.

175. *Id.* at 10.

176. Appellant's Brief, *supra* note 52, at 32.

177. KAL also relied on the definition in Black's Dictionary. Appellee's Brief, *supra* note 52, at 47. Plaintiff questioned the use of this authority since the accompanying example given in Black's did not involve employment. Appellant's Brief, *supra* note 52, at 32-33.

178. Appellee's Brief, *supra* note 52, at 46.

179. *Id.* at 47.

180. *Id.*

181. *Id.*

cretion in hiring decisions, so "the term engagement naturally includes termination."¹⁸²

The Third Circuit Court of Appeals queried whether article VIII(1) allowed KAL to fire MacNamara for the very reason of reassigning his job to an executive of their choice.¹⁸³ It concluded that such a replacement was within the definition of engage.¹⁸⁴ The court stated that a "contrary reading of [a]rticle VIII(1) would tend to freeze a foreign business' initial management structure and discourage any experimentation with host country executive personnel," and that it was certain this was not the intent of the treaty drafters.¹⁸⁵ This statement suggests that the court would allow a termination under the treaty for reasons other than the fact that there was a replacement for the terminated employee. For example, a restructuring of the company or a mere desire to fire an executive who is a native of the host country constitutes a sufficient reason to terminate an employee.

III. APPLICATION OF THE DEFINITION OF EXECUTIVE AND ENGAGE TO MACNAMARA'S POSITION AT KOREAN AIR LINES

A. Critique of the Various Definitions of Executive

In analyzing whether MacNamara was an executive according to the FCN treaty, it is critical to note that the purpose of the treaty's provision allowing foreign companies to engage executives of their choice is to allow foreign companies doing business in the United States to manage and control their investments.¹⁸⁶ Thus, the issue of whether, or to what extent, a foreign-owned company can engage executive personnel of their choice is of such importance that courts have a duty to set a clear stan-

182. *MacNamara v. Korean Air Lines*, 45 Fair Empl. Prac. Cas. (BNA) 384, 389 (E.D. Pa. 1987).

183. *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1141 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 349 (1989).

184. *Id.*

185. *Id.*

186. *See supra* notes 50-52 and accompanying text. In assessing the meaning of the terms of this treaty, certain rules of treaty interpretation must be kept in mind. Treaties are part of the domestic law of the United States (*Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924)) and are the supreme law of the land. U.S. CONST. art. VI, cl. 2. A court's role in interpreting a treaty is limited to giving effect to the intent of the treaty parties. *Sumitomo, Shoji America, Inc. v. Avagliano*, 457 U.S. 185 (1982). Inconsistent federal legislation governs only when Congress clearly intends to depart from the obligations of the treaty. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963). Moreover, the meaning given to treaties by departments of government charged with their negotiation and enforcement is given great weight. *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961).

dard for the interpretation of what constitutes an executive under a FCN treaty.

1. Immigration and Naturalization Act

As noted, the INA definition of executive closely approximates the FCN treaty's definition, as the Act was meant to complement such treaties.¹⁸⁷ While there is no specific definition of executive in the INA itself, there are indications in the accompanying C.F.R. regulations that the position must entail duties of an executive or supervisory character.¹⁸⁸ The most specific guidelines are set forth in State Department Instructions for granting treaty trader visas.¹⁸⁹

MacNamara's position does not fit within the State Department's definition of executive. His job entailed responsibility for only a three-state sales office of an international company; this does not represent a large part of KAL's operations. His position required supervision of low-level employees, which indicates only incidental involvement in executive duties. Although MacNamara did have some degree of discretion and responsibility, his discretion was limited in many ways.¹⁹⁰ MacNamara is better characterized as a middle manager rather than a top manager because he lacked ultimate control over the company's operations. Further, top level management of a large company such as KAL would be expected to command a salary of more than the 23,000 dollars per year earned by MacNamara. For these reasons, it is not feasible to characterize MacNamara as holding a management or executive position as defined by the INA.

2. Fair Labor Standards Act

There is little doubt that MacNamara would be defined as an executive under the FLSA definition of that term. He earned more than 250 dollars per week, his primary duty was to manage an enterprise (the regional sales office), and he regularly directed the activities of two or more people. If positions such as assistant manager of a fast food restaurant and park service manager are executives under the FLSA, MacNamara's position would clearly be executive as well.

However, the purpose of the FLSA is quite different from the purpose of a FCN treaty. The FLSA purports only to guarantee a minimum

187. See *supra* note 98 and accompanying text.

188. See *supra* note 99 and accompanying text.

189. See *supra* notes 105-110 and accompanying text.

190. For example, his decisions regarding employee hiring and promotion were subject to approval from higher level managers.

standard of living.¹⁹¹ It excludes executives from the wage and hour requirements as they presumably do not need this statutory protection.¹⁹² Nonetheless, classifying executives as those needing no protection from unduly low compensation is a much different matter than deciding which executives manage and control a business. Thus, FLSA's definition of executive is broader than that contemplated by the latter. Although MacNamara would be considered an executive under the FLSA, this definition is not the proper standard to use in disputes arising under FCN treaties.

3. The Age Discrimination in Employment Act

Under the ADEA, KAL would find little support for its claim of MacNamara's executive status. The Act defines executive very narrowly, including only a few top-level employees who exercise substantial authority over a significant number of employees and a large volume of business; middle managers are not executives under this statute.¹⁹³

Since MacNamara's duties and level of responsibility resembled those of a middle manager, he would probably not be considered an executive under the ADEA. His managerial duties, such as supervising administrative personnel, overseeing sales for a three state territory, and developing marketing plans, do require some degree of responsibility and discretion. However, they do not entail substantial executive authority over a significant number of employees and a large volume of business.

The executive provision in the FCN treaty coincides with the executive exception in ADEA more closely than with the exception in the FLSA. However, the ADEA definition of executive may be a bit narrow for the purposes of the FCN treaty since there are managerial employees beneath the highest level in a business who still contribute significantly to the management and control of the enterprise.

4. Bankruptcy Act

As noted, the Bankruptcy Act has limited value in the search for an appropriate definition of executive. The sparse case law has interpreted an executive under the Act to be one with policymaking authority.¹⁹⁴ This is in keeping with the Act's purpose of limiting liability for false financial statements to those who are likely to be aware of the severe

191. See *supra* note 116 and accompanying text.

192. See *supra* note 116 and accompanying text.

193. See *supra* notes 137-140 and accompanying text.

194. See *supra* note 151 and accompanying text.

consequences.¹⁹⁵ Therefore, the definition of executive under this Act involves a qualitative rather than a quantitative inquiry. Under this statute, the *type* of an employee's responsibility is examined to determine whether it involves policymaking. This is different from the INA, the FLSA, and ADEA definitions of executive, which largely involve an inquiry into *how much* responsibility an employee has, as well as the *type* of responsibility. Although MacNamara had some supervisory and discretionary authority, he had very little policy-making authority and, therefore, would probably not be an executive within the meaning of the Bankruptcy Act.

The purpose of the Bankruptcy Act executive provision does not closely coincide with the purpose of the FCN treaties. For this reason, this Act's definition of executive would not be helpful in interpreting the term in the FCN treaties. Although policy-making is an important part of managing and controlling an enterprise, it is only one part. There are other aspects of management and control, such as responsibility for profits and losses, budgeting, long-term planning, and other duties.

In sum, of all the domestic statutes defining executive, that which most closely approximates the purpose of the FCN treaty is the INA, since it was enacted to complement the treaties.¹⁹⁶ Thus, the best source for a definition is the State Department Instructions.¹⁹⁷ This definition could be supplemented by the definition in the ADEA, since its purpose and interpretation approximates that of the treaty. The FLSA and Bankruptcy Acts, however, were enacted for different purposes, and their definitions do not comply with that contemplated for the treaty. Thus, they should not be relied on.

B. International Labor Organization's International Standard Classification of Occupations

Measured against the ISCO's characterization of specific occupations, it is doubtful that MacNamara performed the "manager's" duties, functions, and tasks equivalent to those of executive personnel. Both the district and Third Circuit courts concluded that his position and responsibilities, as well as those of his replacement, constituted executive status. However, finding that MacNamara was a manager with executive personnel status is far too generous a construction of the realities of his job.

Both of the court opinions develop and rely on an incomplete and

195. See *supra* note 150 and accompanying text.

196. See *supra* note 98 and accompanying text.

197. See *supra* notes 105-110 and accompanying text.

flawed picture of MacNamara's job and the meaning of executive. While the district court settles principally on the FLSA to assess MacNamara's status, the Third Circuit turns to the treaty trader status of his replacement as evidence of executive status under the FCN treaty. These fallible approaches to understanding the meaning of executive, coupled with the Third Circuit court's unwillingness to confront this issue on appeal resulted in an improper finding that MacNamara was an executive.

The courts' approaches further complicate the meaning of the term and fall short of offering concrete guidance to other courts. Courts require a workable definition of executive in order to adjudicate labor disputes under FCN treaties. The *Korean Air Lines* courts should have focused on MacNamara's responsibilities as well as his replacement's duties, functions, and tasks under the ISCO to arrive at a definition of executive personnel. Without a clear meaning of this term, labor litigation will persist when the parties attempt to determine whether a foreign company has the freedom to select an executive of its choice.

The district court found that an employee seeking entry into the United States must have "duties of an executive or supervisory character," but the court did not enumerate these duties.¹⁹⁸ The court of appeals held that "the relevant inquiry is whether MacNamara's responsibilities were reassigned to an 'executive' within the meaning of [article VIII(1)]."¹⁹⁹ The court of appeals also found "that the government's decision granting entry to Chung as an E-1 treaty trader is strong evidence of his executive personnel status."²⁰⁰

No doubt both MacNamara and his replacement performed *some* of the *supervisory* duties of executive personnel. However, viewed through the lens of the ILO's standards on high level management personnel, neither MacNamara nor Chung possessed the broad range of responsibilities necessary to characterize them as executive personnel. Thus, a critical evaluation of the facts under the ILO standards raises a pertinent question about the court's outright acceptance of MacNamara's status as an executive. In short, there is serious doubt that MacNamara (or even his replacement) ever served as an "executive" under the terms of the FCN treaty or the ISCO.²⁰¹

198. See *supra* notes 90-91 and accompanying text.

199. *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1141 (3rd Cir. 1988).

200. *Id.* at 1142.

201. See *id.* at 1141-2. In his cross-petition for certiorari, MacNamara recounts his contention that his job did not pose executive responsibilities. He says that his duties as district sales manager were "purely administrative." MacNamara's Cross-Petition, *supra* note 43, at 12. Any "serious decisions involving such things as hiring and firing of personnel, could only be made with approval of KAL's offices in New York, Los Angeles, or Seoul, Korea." *Id.*

1. ISCO's Definition of Sales Manager

The ISCO notes that a "sales manager" is one who:

Plans, organises and controls *sales activities of an industrial undertaking* or other organisation, except a wholesale or retail business, and participates in formulating sales policy: assesses market potential and evaluates sales record [sic]; consults general manager and departmental managers to determine price schedules, discount and delivery terms, staff and sales promotion budget; plans and organises sales programmes including sales methods, incentives, special campaigns and staff training; controls and co-ordinates the activities of the sales department . . . and . . . [m]ay personally negotiate large sales contracts. May plan, organise and control market research related to sales activities. May negotiate with advertising and similar agencies on the preparation and presentation of the organisation's sales publicity and approve material before publication.²⁰²

Although MacNamara performed some of the duties of a "sales manager"²⁰³ (e.g., handled some personnel matters, was involved to some extent in sales activities and setting of some sales strategies, and had limited authority), he did not perform sales activities of an industrial undertaking. Though MacNamara held the title "district sales manager," the ISCO would not automatically elevate his overall job functions, duties, tasks, and responsibilities to the level of executive status. The ISCO offers several descriptions of managerial status,²⁰⁴ and cautions that some members of this subcategory may not be considered managers if they have "special titles, including such titles as 'chief,' 'director' or 'manager,' but . . . do not principally carry out duties within the scope of the function of management."²⁰⁵ Such individuals "principally perform professional or technical functions," but are not considered "managers."²⁰⁶

MacNamara then contends that the district court and the Third Circuit found that his job was entitled to executive status as well as his replacement, and that these "conclusions reached by the [courts] as to the status of MacNamara's successor were inappropriate." *Id.*

202. ISCO, *supra* note 155, at 96 (emphasis added).

203. MacNamara participated in formulating sales policy for the district, but not the entire organization. *Korean Air Lines*, 45 Fair Empl. Prac. Cas. (BNA) at 388. He evaluated some sales activities and hired and fired a staff of six. See ISCO, *supra* note 155, at 96. However, according to the ISCO, he functioned as a "sales supervisor" who "supervise[d] workers engaged in selling activities." *Id.* at 116. He estimated the needs of customers and his staff. He also supervised and instructed the sales staff in their daily activities. MacNamara also made "recommendations concerning sales promotion and price policies." *Id.* at 117 (definition of sales supervisor (retail trade)).

204. ISCO, *supra* note 155, at 95-97.

205. *Id.* at 95.

206. *Id.*

MacNamara typifies a person who does not perform executive status functions, but who has a special title and appears to perform a few of the tasks reserved for executive personnel. He was a district sales manager of a KAL branch office operating in the United States. He was in reality functioning as a professional sales supervisor²⁰⁷ whose functions are *not* considered those of a manager.²⁰⁸

2. ISCO's Definition of Sales Supervisor

The ISCO characterizes a sales supervisor²⁰⁹ as someone who: Supervises workers in a retail trade establishment engaged in buying goods for resale and selling them for personal or household consumption or other use: under the general direction of the proprietor or manager, estimates the needs of customers and orders goods of the types, qualities and quantities required; supervises and *instructs sales staff in their day-to-day work in accordance with the sales policies* of the undertaking; ensures that goods are attractively and effectively displayed and that security, accounting and stock control rules and procedures are observed.

May engage staff and initiate other personnel action such as promotion, transfer, discharge and disciplinary measures. May make recommendations concerning sales promotion and pricing policies.²¹⁰

Other sales supervisors not included in the above description may perform supervisory duties and perform a combination of tasks such as:

supervis[ing] canvassing, display, or demonstration activities; inspect[ing] sales activities in various *branches* or departments of a retail or wholesale establishment; supervis[ing] sales workers employed in the sales department of a manufacturing enterprise; inspect[ing] the activities and results of distribution agencies within a specified territorial division engaged in selling the products of an industrial, import or other undertaking; [and] give expert advice on sales promotion methods.²¹¹

A sales supervisor "instructs sales staff in their day-to-day work in accordance with the sales policies."²¹² Such an employee does not "principally carry out duties within the scope of the functions of manage-

207. *See id.* at 116.

208. *Id.* at 95.

209. *Id.* at 117.

210. *Id.* (emphasis added).

211. *Id.* at 117 (emphasis added). This description of other sales supervisors matches or very much resembles MacNamara's job function.

212. *Id.*

ment,"²¹³ but actually performs as a professional or technical person.²¹⁴

Not only was MacNamara a district sales manager of a branch office in America, but he received a salary of only 23,000 dollars per year. His duties included supervising the airline marketing activities in Pennsylvania, Delaware, and southern New Jersey. The district court noted that MacNamara reported to the Vice President of Marketing for North America in New York, supervised six personnel, hired and fired staff, and was involved in cargo and passenger sales.²¹⁵ He also implemented strategic marketing changes without headquarter's authorization.²¹⁶ The court combined MacNamara's job title and limited functions to elevate him to executive status when his functions, duties, and responsibilities resembled those of a sales supervisor.²¹⁷

In short, MacNamara and his replacement are better described under the ISCO as sales supervisors, who handle some routine personnel matters and the day-to-day sales work of the branch office, but not as sales *managers*.

The responsibilities of a sales manager more closely resemble the job of an executive than do those of sales supervisors. MacNamara appears to have been one of several workers who handled *district* sales for the U.S. branch offices in just a few states. He was not the chief person responsible for all of KAL's sales within the United States. The ISCO defines a sales manager as one who "[p]lans, organizes and controls sales activities of an industrial undertaking or other organization"²¹⁸ Although MacNamara performed some of the duties of a manager,²¹⁹ his enriched title did not necessarily qualify him to be classified as a manager, and thus an executive under the ISCO.

IV. FCN TREATIES AND THE DEFINITIONS OF ENGAGE

The FCN treaties offer no definition of the term "engage," nor do any U.S. statutes or cases. MacNamara's cited dictionary definitions only address the term narrowly, and do not consider the various situa-

213. *Id.* at 95. For a definition of sales manager, see *id.* at 96.

214. *Id.* at 11, 95.

215. *MacNamara v. Korean Air Lines*, 45 Fair Empl. Prac. Cas. (BNA) 384, 388 (E.D. Pa. 1987).

216. *Id.* at 387-88.

217. ISCO, *supra* note 155, at 117.

218. *Id.* at 96.

219. For a discussion of "manager", see *id.* at 11, 95. For a definition of sales manager, see *id.* at 96.

tions which could occur involving an interpretation of the term. Since the interpretation of engage in the FCN treaty has never been assessed, it is helpful to consider it from a policy oriented approach, as did KAL and the court of appeals.

These policy reasons turned on KAL's and the court's concern with preserving a company's ability to fire at will, and the negative economic and business consequences that would accompany an inability to do so. KAL argued that the treaty's purpose of allowing foreign companies to manage and control an investment would be thwarted if a company were not allowed to terminate employees as it chose. It also argued that it makes more economic sense to allow companies to restructure, which entails eliminating some positions and, consequently, some employees. The Third Circuit was also concerned with preserving a company's ability to restructure and experiment with different employees without fear that it would be prohibited from firing any of these employees if the experimentation failed.

A company's ability to make business decisions with regard to restructuring, hiring, and firing of employees has not been interfered with absent an express legislative or judicial mandate,²²⁰ and there seems to be no reason to include a *foreign* company's decisions among the rare exceptions to the employment at will doctrine.

If treaties prohibited foreign companies from terminating employees, the result may be similar to other situations in which employers are restricted in their ability to fire. For example, the advent of the FLSA and the evolution of the employment at will doctrine, while unquestionably answering a great need in the United States and engendering many positive effects, have also led to certain detrimental employment practices. Employers and employees alike have been known to take advantage of the law and make use of it in ways not intended. Employers might use the law to limit or deny terms and conditions of employment to employees. On the other hand, some employees whose work performance might not be satisfactory can hide behind similar laws, threatening an employer with the use of various shortcomings in the workplace as a form of blackmail to compel the employer to refrain from taking disciplinary action. The employer may respond accordingly because the employee is in a position to sue the company if fired.

The public policies in favor of allowing companies to make their own employment decisions, and the negative consequences that can oc-

220. See, e.g., 42 U.S.C.A. § 2000e-2 (West 1981) and judicial decisions limiting the "employment at will" doctrine.

cur where this is curtailed, support an interpretation of the definition of engage which includes the power to terminate.

V. CONCLUSION

In sum, the growth of foreign-owned corporations operating in the United States under Friendship, Commerce and Navigation treaties presents U.S. policymakers and the judiciary with a unique opportunity to clarify the meaning of specific FCN provisions as applied to the workforce of these companies. Prior court decisions have failed to set a clear standard as to who are executive personnel under FCN treaties. The interpretation and application of these treaties has a direct effect on commercial deals between the United States and its trading partners.

The term "executive" has a variety of meanings depending on the reference used to evaluate it. For example, the Immigration and Naturalization Act and International Standard Classification of Occupations best provide guidance on the meaning of the term, while the Fair Labor Standards Act, Age Discrimination in Employment Act, and Bankruptcy Act are only marginally useful in the search for an appropriate definition of executive in the FCN treaty context.

Of the several U.S. statutes and international sources, the Immigration and Naturalization Act is most helpful because of its interpretive regulations. The International Standards Classification of Occupations complements the search for an appropriate definition of executive because it lends itself to a creative evaluation of that term. The ISCO also allows for a more realistic and uniform evaluation of the term and captures the essence of the functions performed by executive personnel, giving a standard meaning to the term across international borders.

The definition of engage within the context of FCN treaties is best characterized by the plain meaning of the word. If a FCN treaty entitles a treaty partner to the option of engaging persons of their choice for certain types of positions, quite naturally that treaty provision should also encompass the right of the company to disengage persons of their choice. Government and judicial officers must bear in mind that the plain meaning approach must also approximate the economic realities of the particular treaty. This approach to the term "engage" will most effectively assist the parties involved in understanding the interests of the signatories when called upon to apply the terms of a treaty to the operation of a commercial enterprise. Further, those involved in this process must always be mindful of the essential purpose of a FCN treaty. These bilateral agreements are intended to allow the treaty partners the com-

mercial freedom to control their assets and corporate structure, and make personnel decisions affecting the company abroad without undue influence from the host country. A liberal interpretation and application of the term "engage" furthers that end.